SUPREME COURT, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1240

L. A. DAVIDSON,
Petitioner,

v.

MICHIGAN DEPARTMENT OF REVENUE, now known as THE DIVISION OF REVENUE OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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No. --------

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Petitioner,

v.

MICHIGAN DEPARTMENT OF REVENUE, now known as THE DIVISION OF REVENUE OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Petitioner prays that a Writ of Certionari issue to review the decision of the Michigan Court of Appeals which peremptorily ordered the reversal of a judgment of the Ingham County (Michigan) Circuit Court, Old Chancery No. 45136, for petitioner L. A. Davidson, on the basis of the Michigan Supreme Court's decision in *Walter Toebe & Co. v. Revenue Department*, 378 Mich. 617, 148 N.W.2d 775 (1967).

Petitioner's Application for Leave to Appeal was denied by the Michigan Supreme Court on December 18, 1967.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Court of Appeals is unreported and is printed in Appendix A hereto, *infra*, p. 1a.

The judgment of the Ingham County (Michigan) Circuit Court is unreported and is printed in Appendix A hereto, *infra*, p. 3a, together with the Opinion of the Ingham County (Michigan) Circuit Court denying respondent's Motion to Dismiss (*infra*, p. 5a), upon which the final judgment of the Ingham County (Michigan) Circuit Court was based.

The opinion of the Michigan Supreme Court in *Walter Toebe & Co. v. Revenue Department* upon which the peremptory order of the Michigan Court of Appeals was based, is reported at 378 Mich. 617, 148 N.W.2d 775 and is printed in Appendix B hereto, *infra*, p. 18a.

JURISDICTION

The decision of the Michigan Court of Appeals, *infra* p. 1a, was entered on September 21, 1967.

Petitioner filed Application for Leave to Appeal with the Michigan Supreme Court on October 6, 1967, which Application was denied on December 18, 1967 (*Infra*, p. 16a).

The jurisdiction of this Court is invoked under 28 U.S.C., 1964 ed., § 1257 (3).

QUESTIONS PRESENTED

1. Whether the failure to grant an exemption from the Michigan Use Tax for property purchased by petitioner which is affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a single contract with the State of Michigan, i.e., a contract financed ninety per cent by the United States Government under the Federal-Aid Highway Act of 1956, 23 U.S.C. 1964 ed., § 101, et. seq., when an exemption is granted persons engaged in the business of constructing, altering, repairing or improving real estate for others when property so purchased by such persons is affixed and made a structural part of real estate or used and completely consumed in the

fulfillment of a single contract with a political subdivision of the State of Michigan, constitutes an unconstitutional discrimination against the United States.

2. Whether the granting of an exemption from the Michigan Use Tax for property purchased by persons engaged in the business of constructing, altering, repairing or improving real estate for others when property so purchased by such persons is affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a single contract with a political subdivision of the State of Michigan, but not in the fulfillment of a single contract with the State of Michigan, is so arbitrary, unreasonable and discriminatory as to deny the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const., amend. XIV, § 1. It is printed in Appendix C hereto *infra*, p. 28a.

The statute involved is Section 4(m) of the Michigan Use Tax, Mich. Comp. Laws '48, § 205.94(m), Mich. Stat. Ann. § 21.555(4)(m). It is printed in Appendix C hereto, *infra*, p. 28a.

STATEMENT

Prior to September 1, 1959, the Michigan Use Tax, Mich. Comp. Laws '48, § 205.91 et. seq., as amended, Mich. Stat. Ann. § 21.555(1) et. seq., as amended, exempted from taxation property purchased by persons engaged in the business of constructing, altering, repairing, or improving real estate for others when property so purchased by such persons was affixed and made a structural part of real

estate or used and completely consumed in the fulfillment of a contract with the United States, the State of Michigan, its departments or institutions, or any of its subdivisions. By amendment to the Use Tax by Michigan Public Acts of 1959, No. 263, effective September 1, 1960, this exemption from the use tax for contractors was eliminated for contracts with the United States. By further amendment in 1959, Public Acts of 1959, No. 272, effective January 1, 1960, the Michigan Use Tax exemption for contractors was eliminated for contracts with the State of Michigan. As a result of these two amendments, only property used in contracts with political subdivisions of the State of Michigan was exempted from the imposition of the use tax. The effects of Acts 263 and 272 of 1959 were eliminated by Public Acts of 1964, No. 164, effective August 28, 1964, which restored the contractors exemption for contracts with the United States, the State of Michigan and its political subdivisions.

On July 20, 1962, petitioner brought a Bill for Declaratory Judgment in the Circuit Court for the County of Ingham, State of Michigan, challenging the constitutionality of the amendments to the Michigan Use Tax which deprived petitioner of its exemption from the use tax for property purchased by petitioner which was affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a contract with the State of Michigan. Petitioner's challenge to the constitutionality of the amendments was made in paragraph 19 of petitioner's Bill of Complaint, wherein petitioner said:

> "19. To the extent that said Use Tax Act is construed and applied so as to impose upon plaintiff a Use Tax with respect to property purchased and affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a single contract with the State of Michigan and its departments, while exempting from said Use Tax property purchased by contractors in fulfillment of similar contracts with political subdivisions of the State of Michigan, the said Use Tax Act contravenes and is repugnant to the Constitution of the United States of

America and to the Constitution of the State of Michigan and by way of illustration:

(a) it discriminates against plaintiff as a contractor with the Michigan State Highway Department, a Department of the State of Michigan, and constitutes unreasonable and arbitrary class legislation and deprives plaintiff of his property without due process of law and denies to plaintiff the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States;

* * *

(d) it constitutes a clear and hostile discrimination against contractors with the Michigan State Highway Department with the objective of imposing the economic burden of a tax on the funds contributed by the United States under the Federal Highway Act adopted on August 27, 1958 (72 Stat. 885; Title 23, U. S. Code, Section 101, etc.) and violates the constitutional immunity of the United States from state taxation."

Upon filing of its Bill for Declaratory Judgment, defendant Michigan Department of Revenue filed a Motion to Dismiss. On December 3, 1962, the Circuit Court for the County of Ingham filed its Opinion denying defendant's Motion to Dismiss, printed *infra*, p. 5a, holding that the amendments to the Michigan Use Tax were "patently unreasonable, palpably arbitrary, discriminatory and wholly illusory", *Opinion of the Circuit Court, infra*, p. 14a, and violated Article X, Section 4 of the Michigan Constitution of 1908. The court did not reach the federal constitutional question. By stipulation of the parties entered on February 28, 1966, the request for judicial determination of petitioner's liability for the Michigan Use Taxes imposed by the 1959 amendments was extended to cover the period January 1, 1960 to August 27, 1964. The tax imposed upon petitioner during that period is $666,470.40

plus interest of $56,140.19, a total of $722,610.59 on purchases of materials and supplies which were used and consumed in the fulfillment of a single contract with the Michigan State Highway Department during the period January 1, 1960 to August 27, 1964. Stipulation in Docket No. 45136, dated February 28, 1966. Brief of Michigan Department of Revenue in Docket No. 45136, p. 2, filed July 11, 1966. By the same stipulation, the parties agreed that should the prior Opinion of the Circuit Court become final, all liability of the petitioner for sales or use taxes and interest to and including August 27, 1964 would be fully paid.

During this period from January 1, 1960 through August 27, 1964, petitioner was engaged almost exclusively in projects on the United States Interstate System. Bill for Declaratory Judgment, paragraph 3. Amended Answer, paragraph 3.

On July 18, 1966, the Honorable Marvin J. Salmon, Circuit Judge, entered a Declaratory Judgment for petitioner affirming the court's prior opinion of December 3, 1962, that Act 272 of the Public Acts of 1959 was unconstitutional under the Michigan Constitution and holding such Act void and of no effect and the obligation of the petitioner for sales and use taxes to and including August, 27, 1964 fully paid.

The Department of Revenue filed a Claim of Appeal with the Michigan Court of Appeals on August 5, 1966 and on May 9, 1967 moved for a Peremptory Order to Reverse the Judgment of the Trial Court on the basis of the decision of the Michigan Supreme Court in *Walter Toebe & Co. v. Revenue Department*, 378 Mich. 617, 148 N.W.2d 775, (1967), *infra*, p. 18a. Petitioner raised the federal constitutional question in his brief in opposition to the Motion for Peremptory Order. On September 18, 1967, the Michigan Court of Appeals entered its Order granting defendant's Motion for Peremptory Order, *infra*, p. 1a.

Petitioner on October 6, 1967 filed his Application for Leave to Appeal to the Michigan Supreme Court, which was denied on December 18, 1967. The federal constitutional questions were raised by petitioner on pages 2 and

7 of his Application for Leave to Appeal from Decision of Court of Appeals, and in his brief in support thereof.

REASONS FOR GRANTING THE WRIT

1. The imposition of the Michigan Use Tax on property purchased by contractors which is used and completely consumed in the fulfillment of a contract with the State of Michigan, when such contract is 90% paid for by the United States, constitutes an unconstitutional discrimination against the United States. As indicated above, petitioner during the period January 1, 1960 through August 27, 1964, was engaged almost exclusively in the construction of highways for the State of Michigan, which highways were constructed as a part of the Interstate Highway System and for which the State of Michigan received aid under the Federal-Aid Highway Act of 1956, 23 U.S.C. 1964 ed., § 101 et seq. Under the Federal-Aid Highway Act of 1956, the state is reimbursed 90% of the cost of roads constructed thereunder. 23 U.S.C. 1964 ed., § 120(c).

Under a state contract where the financing and cost of construction are borne entirely by the state itself, there would be no reason for the legislature to amend the Use Tax to delete an exemption for goods purchased in connection with state contracts. If the burden of the Use Tax is passed on to the state by inclusion in the contractor's bid, there is no net effect upon the state whether the exemption is granted or not. If the exemption is granted the state does not pay the tax nor does it collect it. If the exemption is not granted, the state collects the tax but must pay it to the contractor. However, when one examines the amendments to the Michigan Use Tax in light of the enactment of the Federal-Aid Highway Act of 1956, in which Act the 90% reimbursement to the states for the construction of Interstate Highways was introduced, the intent of the Michigan Legislature and the effect of the amendment become obvious. In light of the anticipated development in the construction of Interstate Highways in the State of Michigan, financed 90% by the Federal Government, the removal of the exemption in the Michigan Use

Tax for property purchased by contractors and used and consumed in the fulfillment of a contract with the State of Michigan, as for example, the construction of Interstate Highways, makes fiscal sense to the State at the unconstitutional expense of the federal government. The State of Michigan would in fact receive financial benefit from the amendment to the Use Tax since 90% of the Use Tax payment would be reimbursed by the federal government.

The state assumed petitioner would include the use tax in his bid computations, 90% of which would ultimately be paid by the federal government. Because of his belief in the illegality of such an amendment, petitioner did not include such tax in his bids, and is now being forced to suffer an unconstitutional burden because of his relationship to the Federal Interstate Highway Program.

The result is an unconstitutional discrimination against the United States Government and the persons dealing with it. *Phillips Chemical Company v. Dumas Independent School District,* 361 U.S. 376 (1959).

It is also interesting to note that after the Michigan Supreme Court held that the amendment to the use tax as applied to contracts with the United States was unconstitutional in *Knapp-Stiles v. Department of Revenue,* 370 Mich. 629, 122 N.W.2d 642 (1963), in July, 1963, on the basis of intergovernmental immunity, the Michigan Legislature repealed the effect of both the 1959 amendments by Public Acts of 1964, No. 164, effective August 28, 1964, restoring the exemption from the use tax to contractors for property purchased and affixed and make a structural part of real estate in the fulfillment of a contract with the United States, the State of Michigan and its political subdivisions.

The intent and operative effect of the 1959 amendment was a clear and hostile discrimination against the United States Government and persons dealing with it which must be held unconstitutional under the decision announced by this Court in *Phillips Chemical Co. v. Dumas Independent School District,* 361 U.S. 376 (1959).

2. The 1959 amendment to the Michigan Use Tax which denied an exemption to contractors for materials and supplies which are used and consumed in the fulfillment of

a single contract with the State of Michigan is arbitrary, unreasonable and discriminatory and constitutes a denial of the equal protection of the law guaranteed petitioner by the Fourteenth Amendment to the United States Constitution.

The Michigan Sales Tax, Act 167 of 1933, Mich. Comp. Laws '48, § 205.51 et seq., Mich. Stat. Ann. § 7.521 et seq., as amended, since its inception, has contained an exemption in Section 4(b), Mich. Comp. Laws '48, § 205.54(b), Mich. Stat. Ann. § 7.524, for sales to the United States, the State of Michigan, its departments or institutions, or any of its subdivisions. The Michigan Use Tax, when enacted by Public Acts of 1937, No. 94, contained a similar exemption in Section 4(i), Mich. Comp. Laws '48, § 205.94(i), Mich. Stat. Ann. § 7.555(4) (i), for property sold to the United States, the State of Michigan, its departments or institutions, or any of its subdivisions. The Michigan Use Tax was designed to supplement the Michigan Sales Tax (see *Banner Laundering Company v. State Board,* 297 Mich. 419, 298 N.W. 73 (1941)), and in the area of exemptions to federal, state and political subdivisions of the state, has been consistent with the sales tax since the enactment of the use tax in 1937, except for the 1959 amendments to the Michigan Use Tax, the constitutionality of which are herein challenged.

In *R. C. Mahon Co. v. Department of Revenue,* 306 Mich. 660, 11 N.W.2d 280 (1943), the Michigan Supreme Court held that building contractors were retailers of the goods and materials supplied their customers during the course of a construction contract and were subject to the Michigan Sales Tax. The case also held that because a contractor was subject to payment of the sales tax upon sales to his customers, the contractor was not subject to the Michigan Use Tax on goods upon which the sales tax was paid. In response to the *Mahon* case, the Michigan Legislature in 1949 amended by Public Acts of 1949, No. 272, the definition of sales at retail under the Michigan Sales Tax to provide that the term "sale at retail" shall also include the sale of tangible personal property to persons engaged in the business of constructing, altering, repairing or improving real estate for others except in the fulfillment of a contract with any of the exempt classifica-

tions hereinafter set forth in Section 4 (including the United States, the State of Michigan and its political subdivisions). By this amendment, a contractor was made a consumer of the goods purchased rather than a retailer and liable for the payment of the Michigan Sales Tax to his seller. At the same time, by Public Acts of 1949, No. 273, Section 4(m) of the Use Tax was amended to exempt from taxation property purchased by persons engaged in the business of constructing, altering, repairing, or improving real estate for others when property so purchased by such persons was affixed and made a structural part of estate in the fulfillment of a contract within the exempt classifications set forth in subsections (b) (i) (j) and (k) of section 4 (which included the United States, the State of Michigan and its political subdivisions).

In 1955 the sales and use taxes were both amended to provide a further exemption for property used or consumed in the fulfillment of a contract within the exempt classifications in addition to property affixed and made a structural part of real estate in contracts within the exempt classifications. Public Acts of 1955, No. 236 (Sales Tax) and No. 235 (Use Tax).

In 1959, the Michigan Legislature departed from its pattern of dual amendments of both the Michigan Sales and Michigan Use Tax statutes and twice amended the Michigan Use Tax by Public Acts of 1959, No. 263 and 273. The sales tax was not amended. By Public Acts of 1959, No. 263, the Michigan Legislature provided that the exemption for property purchased by contractors which was affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a contract within the exempt classifications should not apply to contracts with "the United States, its incorporated agencies and instrumentalities or any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States". By this amendment, the legislature created a distinction in a contractor's liability for the Michigan Use Tax between goods purchased for contracts with the State of Michigan or its political subdivisions and goods purchased for contracts with the United States.

Later in 1959, by Public Acts of 1959, No. 272, effective January 1, 1960, the legislature further amended the Michigan Use Tax, with no comparable amendment of the sales tax, to exclude the contractor's use tax exemption for contracts with the State of Michigan, its departments or institutions. The result of both amendments was that only property purchased by contractors which was affixed to real estate or used and completely consumed in the fulfillment of a contract with a political subdivision of the State of Michigan was exempt from the Michigan Use Tax, while goods so purchased in connection with contracts with the United States or the State of Michigan were subject to the tax. The sales tax was not so amended, and sales to contractors were exempt from taxation when the goods sold were so used in connection with a contract with the United States, the State of Michigan or the political subdivisions of the State.

In *Knapp-Stiles v. Department of Revenue,* 370 Mich. 629, 122 N.W.2d 642 (1963), the Michigan Supreme Court held that the amendment by Public Acts of 1959, No. 263, deleting the exemption for contracts with the United States, was unconstitutional. The opinion in its language, was based upon two grounds. First, the Michigan Supreme Court held,

> "No reasonable basis appears to support a classification for use tax exemption purposes which distinguishes between the United States or its instrumentalities, agencies, or corporations and those dealing or contracting therewith, on the one hand, and, on the other hand, the State's political subdivisions and those dealing or contracting with them. That such distinction is arbitrary, unreasonable and discriminatory is evident." 370 Mich. 629, 639, 640; 122 N.W.2d 642, 647.

Such language implies that a distinction for use tax purposes which distinguishes between contracts with the United States and contracts with the state's political subdivisions denies the equal protection of the law and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitu-

tion. See *Citizens' Telephone Co. v. Fuller*, 229 U.S. 322, 331 (1913), and *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-528 (1959).

The Michigan Court went on to find that the elimination of the exemption also constituted a discrimination against the United States and was therefore unconstitutional under the holding of *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1959).

The result of the *Knapp-Stiles* case, *supra*, was that the exemption from the Michigan Use Tax for goods bought to fulfill a contract with the United States was restored, and, among governmental entities, only goods bought to fulfill contracts with the State of Michigan were non-exempt.

The Ingham County Circuit Court, in its Opinion dated December 3, 1962, *infra*, p. 5a, which it affirmed by Declaratory Judgment for petitioner on July 18, 1966, found that the distinction created by the 1959 amendment to the Michigan Use Tax which resulted in different treatment for contracts between a contractor and the State of Michigan and a contractor and the political subdivisions of the State of Michigan was "patently unreasonable, palpably arbitrary, discriminatory and wholly illusory." Opinion of the Court in Docket No. 45136, *infra*, p. 14a.

The Michigan Court of Appeals reversed the decision of the Ingham County Circuit Court on the basis of the Michigan Supreme Court's holding in *Walter Toebe & Co. v. Revenue Department*, 378 Mich. 617, 148 N.W.2d 775 (1967).

In the *Toebe* case, *supra*, the Michigan Supreme Court held that the distinction between the treatment afforded a contractor engaged in a contract with the State of Michigan and a contractor engaged in a contract with a political subdivision of the State of Michigan was justified because,

> "* * * there exist many basic differences between the State and its subdivisions that would justify the legislature exempting the tax on materials used in constructing county, city, and village roads and not State roads, and we have stated in cases like the present that it is not the function of this Court to consider the propriety or justness of the tax, nor to

criticize the public policy which led to adoption of the legislation." 378 Mich. at 623, 148 N.W.2d at 777.

The Court distinguished its holding in *Knapp-Stiles, supra,* on the ground that *Knapp-Stiles* involved only the question of intergovernmental immunity and not the arbitrary nature of the different exemptions. If, however, a distinction between the United States and the political subdivisions of the State of Michigan is evidently arbitrary, unreasonable and discriminatory, *Knapp-Stiles v. Dept. of Revenue,* 370 Mich. 629, 640, 122 N.W.2d 642, 647, it is difficult to see why a distinction between the State of Michigan and its political subdivisions is not similarly arbitrary, unreasonable and discriminatory. By its holding in *Toebe,* the Michigan Supreme Court apparently read out the first ground of its decision in *Knapp-Stiles,* leaving only the question of intergovernmental immunity.

There is no basis upon which to support a classification which exempts from the Michigan Use Tax property purchased by contractors which is used and completely consumed in the fulfillment of a contract with a political subdivision of the State of Michigan and subjects to tax property purchased by a contractor which is used and completely consumed in the fulfillment of a contract with the State of Michigan when the result of such classification is to impose upon petitioner a tax burden in excess of $700,000.00.

The basis of any exemption for contracts with governmental entities is the assumption that the ultimate burden will fall on the governmental entity involved, a fact recognized by the Michigan Supreme Court in *Toebe, supra.* (In fact, this result has not occurred herein, where petitioner, believing the 1959 amendments unconstitutional, did not include the use tax in his bid computations and will bear the full burden of such an unconstitutional classification if unsuccessful herein.) The defendant argued and the Michigan Supreme Court agreed that there are sufficient distinctions between the state and its political subdivisions to justify this treatment afforded contractors depending upon the governmental entity involved. Such distinctions are wholly illusory when the exemption is granted to the political subdivision but imposed upon

the State. Even assuming, *argumendo,* that it is the ultimate contracting party, either the State or its political subdivision which bears the burden of the use tax as an item of the contractor's cost which is included in his bid, there is neither sense nor reason in the state imposing the use tax on contracts with the state, since the state will thereafter pay the tax to itself. To impose the tax upon a political subdivision results in a reallocation of funds between the political subdivision and the state. To impose a tax upon the state involves no such reallocation. As far as the state is concerned, if the burden is borne by the state, there is no difference in result whether the exemption is granted or not. When the exemption is granted, the state receives no income but is not required to pay the tax. When no exemption is granted, the state receives the income but is required to pay the tax. The net result, to the state, is the same.

However, as is the case here presented, where the burden of the tax is on the contractor, a distinction between contracts with the State and its political subdivisions is arbitrary, unreasonable and discriminatory. Such a palpably arbitrary distinction exceeds the classification powers of the State of Michigan and violates the Equal Protection guarantee of the Fourteenth Amendment to the Constitution of the United States. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 526-528.

3. The legal maxim, "hard cases make bad law", is exemplified by the decision of the Michigan Supreme Court in *Walter Toebe & Co. v. Revenue Department,* 378 Mich. 617, 148 N.W.2d 775 (1967). If, as noted above, a distinction between contracts with the United States and contracts with the state's political subdivisions is arbitrary, unreasonable and discriminatory, a distinction between contracts with the State of Michigan and contracts with the state's political subdivisions must also be arbitrary, unreasonable and discriminatory. Under the logical reasoning of the *Knapp-Stiles* case, *supra,* the same result should have been arrived at in the *Toebe* case, *supra.* The court made particular note of the fact in the *Toebe* case that the economic burden of the failure to grant an exemption for

contractors with the State of Michigan would not fall on the contractor because the tax, if imposed, would be an element of the unit price in the bid which is repaid to the contractor upon payment from the state. The court noted:

> "Plaintiff Toebe-Hull Company admits in the pleadings in this case that it considered the tax in computing its bid and thereby such tax was included in its contract price, * * *" 378 Mich. at 624, 148 N.W.2d at 778.

To grant the petition of Walter Toebe Co. would have resulted in a windfall gain to the contractor, who, by his own pleadings and admissions, had already been reimbursed by the state for the amount of the tax. Furthermore, the reported facts do not reveal whether construction of Interstate Highways was involved. Rather than to produce such a windfall to the contractor, and in the absence of the governmental immunity question being raised, the Michigan Supreme Court chose to allow the state to receive the benefits, if any, and upheld the constitutionality of the 1959 amendment.

When no such windfall gain will herein result inasmuch as petitioner L. A. Davidson did not include the Michigan Use Tax in his bids submitted to the state for the reason that said use tax was believed to be unconstitutional, and the assessment of the use tax upon L. A. Davidson will result in the denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution, and an unconstitutional burden on the United States government and those with whom it deals, the decision of the Michigan Court of Appeals must be reversed.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 18, 1968

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APPENDIX C — CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

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APPENDIX A — OPINIONS BELOW

COURT OF APPEALS OF THE STATE OF MICHIGAN

L. A. DAVIDSON,
Plaintiff-Appellee,
v.
THE DIVISION OF REVENUE OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Defendant-Appellant.

No. 2522

ORDER

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 18th day of September in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable

T. John Lesinski
Presiding Judge

Thomas Giles Kavanagh
Louis D. McGregor
Judges

In this cause a motion for a peremptory order, in accordance with GCR 1963, 820.1(7), reversing the judgment of the Ingham County Circuit Court, is filed, and a brief in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for a peremptory order be, and the same is hereby GRANTED, for the reason that the contrary holding on the same issue by the Supreme Court in *Walter Toebe & Co. v. Revenue Department* (1967), 378 Mich 617, is dispositive of the matter.

The case is remanded to the Ingham County Circuit Court with instructions to render a determination of the other issues involved.

IT IS FURTHER ORDERED that the motion to affirm be, and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 21st day of September in the year of our Lord one thousand nine hundred and sixty-seven.

(s) Ronald L. Dzierbicki
Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

L. A. DAVIDSON,
Plaintiff,

v.

Docket No. 45136

MICHIGAN DEPARTMENT OF REVENUE,
Defendant.

DECLARATORY JUDGMENT

The above entitled action was first brought at issue before the Court by a motion on the part of the defendant, Michigan Department of Revenue, to dismiss the plaintiff's bill, which motion was denied in a finding of the Court dated December 3, 1962, and the Court, in its opinion, announced its findings of law controlling the issues presented.

Thereafter, by stipulation of the parties filed in said cause, the period over which taxes were alleged to have accumulated was extended from the original date of September 30, 1961 to and including August 27, 1964, which was the full period during which Act No. 272 of Public Acts of 1959, the constitutionality of which was an issue in this cause, remained in the Statutes of the State of Michigan.

By its finding of December 3, 1962, the Court determined that Act 272 of Public Acts of 1959 was unconstitutional.

By stipulation on file in said cause, it was agreed between the parties that if the finding of the Court, as recited, holding Act 272 of the Public Acts of 1959 unconstitutional were to stand as final, "all liability of the plaintiff for sales or use taxes and interest to and including August 27, 1964 are fully paid".

The parties having eliminated, by agreement, all questions except that of the constitutionality of Act 272 of

Public Acts of 1959, the Court concludes that the declaratory relief claimed by the plaintiff in his original bill of complaint and over the period extended by stipulation of the parties, should be granted;

IT IS THEREFORE HEREBY ORDERED and ADJUDGED that Act 272 of the Public Acts of 1959 is unconstitutional and that any assessment issued by the defendant, Michigan Department of Revenue, against the plaintiff, L. A. Davidson, in reliance upon the provisions of said Act 272 of Public Acts of 1959 are void and of no effect and that the obligation of the plaintiff for sales and use taxes to and including August 27, 1964, with any interest thereon, are fully paid.

(s) Marvin J. Salmon
Circuit Judge

Dated at Lansing, Michigan
This 18 day of July, 1966.

Approved as to form:

(s) Maurice Barbour
(s) Carl H. Reynolds

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM, IN CHANCERY

L. A. DAVIDSON,
Plaintiff,

v. Docket No. 45136

MICHIGAN DEPARTMENT OF REVENUE,
Defendant.

OPINION OF THE COURT

Plaintiff has filed a bill for declaratory judgment in which he asks this Court to determine and find that he is not liable for certain taxes assessed against him by the defendant under Act 94 of the Public Acts of 1929 as amended (Stat. Ann. 7.555 (1) et seq), this being the "Use Tax Act", on certain equipment and materials used by him in constructing highways under contracts with the Michigan State Highway Department.

More specifically he prays that this Court decree as follows:

"(A) That he is not a 'consumer' within the meaning of that term as defined in Sec. 2 (g) of Act 94, Public Acts of 1937, as amended.

(B) That the unappealed from decision of this Court in the case of *L. A. Davidson v. Michigan Department of Revenue,* Ingham County Circuit Court, in Chancery No. 36,545, is binding upon the defendant and that defendant's assessments against plaintiff for the period 1955 through December 31, 1959 are unlawful, null and void and that plaintiff is not obliged or required to comply with said assessments or pay the taxes specified therein for said period.

(C) That the amendments purportedly made to the Use Tax Act by Act 235, Public Acts of 1955 and Acts 263 and 272, Public Acts of 1959 were not validly enacted.

(D) That Act No. 94, Public Acts of Michigan, 1937, as amended by Act No. 272, Public Acts of Michigan, 1959, is unconstitutional, null and void insofar as it purports to require Plaintiff to pay a Use Tax with respect to property purchased by him in fulfillment of contracts with the State of Michigan, its departments or institutions; that the Use Tax assessment heretofore made against plaintiff by defendant for the period January 1, 1960 through September 30, 1961, is unlawful, null and void, and that plaintiff is not obliged or required to comply with said assessment or pay the tax specified therein.

(F) That the Court unequivocally defines the exemptions applicable under the provisions of Act 167 of the Public Acts of Michigan of 1933, as amended at the date hereof, and Act 94 of the Public Acts of Michigan of 1937, as amended at the date hereof with respect to plaintiff's purchases for the period October 1, 1961 to date, and to all purchases of like nature which he may make in the future."

The defendant has filed a motion to dismiss the bill for the following reasons:

"1. That no case or controversy exists between the plaintiff and the Michigan Department of Revenue and that any controversy over the intent to assess F 65377 of June 4, 1962 (attached hereto as Exhibit A), and the letter of assessment in regard to the intent to assess F 65377 (attached hereto as Exhibit B), is not now subject to judicial review.

2. That the substantive questions sought to be raised in the so-called 'Bill for Declaratory Judgment' have been conclusively adjudicated in the case of:

L. A. Davidson, Plaintiff v. James M. Hare, Secretary of State of the State of Michigan, Defendant, Mich-

igan Supreme Court Calendar No. 48,800, decided 12/1/61 (365 Mich 162), rehearing denied 3/15/62.

3. That the Plaintiff has not set forth a case or controversy in his so-called 'Bill for Declaratory Judgment' under the provisions of Act No. 36, Public Acts of 1929, as amended (MSA 27.501, et seq).

4. That, in any event, the so-called "Bill for Declaratory Judgment" does not set forth a cause of action."

The parties have filed briefs and oral argument was heard on November 15, 1962. The argument went to the issues of res judicata and the constitutionality of the 1959 amendment, (Act 272 Public Acts 1959) and the Court was informed at that time that these two issues were the only issues which the parties were requesting be determined under the motion.

As to the issue of res judicata the plaintiff contends that the unappealed from decision of February 14, 1957 of the Ingham County Circuit Court in the case of Davidson vs. Department of Revenue, Chancery Docket No. 26,545 is res judicata as to purchases by plaintiff of equipment prior to January 1, 1960, this being the effective date of Act 272, Public Acts 1959.

On the other hand the defendant contends that the case of L. A. Davidson v. James M. Hare, Secretary of State, 365 Mich 162, decided December 1, 1961 conclusively adjudicated the questions sought to be raised in plaintiff's bill.

To decide this issue it is necessary to consider the Use Tax Act in light of some of the changes made therein from time to time and cases decided thereunder.

The act as amended by Act 273 of Public Acts of 1949 provided in Section 4 (m) and (i) that the tax should not apply to property purchased by persons engaged in the business of constructing, altering or improving real es-

tate for others when property so purchased by such persons was affixed to and made a structural part of real estate in the fulfillment of a contract with the United States, the State of Michigan or any of its political subdivisions.

Then on December 29, 1953 our Supreme Court in the case of Garavaglia vs. the Department of Revenue 338 Mich 467 decided that materials such as form lumber, nails, etc. used in the performance of contracts for construction jobs with the State Highway Department were not subject to Use Tax even though the materials sought to be taxed did not become a part of the highway. The Court said:

> "It clearly appears from the language of Sec. 4 of the General Sales Tax Act that the Legislature intended that the Department of Revenue could not impose a direct or indirect sales or use tax upon another entity of the State of Michigan."
>
> (Stat. Ann. 7.524)

In light of the Garavaglia case the Legislature by Act 235 of Public Acts 1955 effective October 14, 1955 amended Sec. 4 (m) of the Use Tax Act (Stat. Ann. 7.555 (4) (m) (i)) to read as follows:

> "Sec. 4. The tax hereby levied shall not apply to: * * * (m). Property purchased by persons engaged in the business of constructing, altering, repairing, or improving real estate for others when property so purchased by such persons shall be affixed and made a structural part of real estate *or used and completely consumed in the fulfillment of a single contract within the exempt classifications set forth in sub-sections (b), (i), (j), and (k) of this section;*" * * * (Emphasis ours)

It is clear that following the above amendment in 1955 the use tax applied to Plaintiff on equipment purchased by him and not completely consumed in the fulfillment of

a single contract unless as claimed by him the 1957 unappealed from decision of the Ingham County Court is res judicata of the matter.

The decision last above mentioned concerned equipment purchased by the plaintiff on February 28, 1953 and October 29, 1954 and the Defendants' assessment of October 10, 1955. The purchases and assessment being made before the 1955 amendment, the Ingham County Court applied the rule laid down in Garavaglia supra and not the amendment, and held that the plaintiff was not required to pay a tax thereon.

The Decree entered by this Court on February 14, 1957 in the above mentioned case provides in part as follows:

> "The Court finds that the transaction upon which a tax has been assessed by the Defendant under color of authority of Public Act 167 of the Public Acts of Michigan of 1933, as amended, (the so-called Sales Tax Law), and which authority is questioned in this case, are exempt from such tax under the holding of the Supreme Court of Michigan in the case of *Garavaglia v. Michigan Department of Revenue*, 338 *Mich* 467, because imposition of the tax would impose the burden thereof upon an agency of the State, its Highway Department; from which all state agencies are exempt, under the law. On motion of Carl H. Reynolds, attorney for the Plaintiff, It is ordered, Adjudged and Decreed that the assessments herein complained of are void and of no effect."

Plaintiff still contends that the above-mentioned Decree was decided in light of the 1955 amendment and is res judicata as to purchases thereafter. This Court does not so find and the case was not so treated by our Supreme Court, when on December 1, 1961, it decided Davidson vs. Secretary of State, 365 Mich 162.

That case clearly does not treat the unappealed from decision as res judicata and departs from the Garavaglia

case and is to the effect that under the 1955 amendment when the Legislature said "completely consumed in the fulfillment of a single contract" that plaintiff was not entitled to purchase free of the tax equipment not so consumed in fulfillment of a single contract.

That case in our opinion even though the matter of res judicata was not expressly dealt with by the Court is nonetheless res judicata of the fact that purchases of equipment and other materials, after adoption of the 1955 amendment, were taxable as provided therein. The argument has been advanced by Plaintiff that because the Department of Revenue was not a party to said suit that it cannot now claim res judicata by virtue of it. "Ordinarily there is privity between officers or agencies of the same government" (50 CJS Pg. 335), and that rule appears to be applicable here.

As to the constitutionality of Act 272 Public Acts 1959 that issue arises by virtue of the fact that prior to September 1, 1959 Sec 4 (m) and (i) of the act exempted property purchased in fulfillment of contracts with the United States, the State of Michigan and its political subdivisions. In 1959, Sec. 4 (m) was amended by Act 263, Public Acts 1959, effective September 1, 1959, thereby eliminating the United States as an exempt entity and was again amended in 1959 by Act 272 Public Acts 1959, effective January 1, 1960 thereby eliminating the State of Michigan as an exempt entity leaving among others the political subdivisions of our State as exempt entities.

Plaintiff claims that road contractors transacting business with governmental entities constitute a single class of taxpayers and that the legislature cannot constitutionally tax said contractors with the State while exempting contractors with its political subdivisions. More specifically in this regard plaintiff avers as to the last amendment that:

> "(a) it discriminates against plaintiff as a contractor with the Michigan State Highway Department, a De-

partment of the State of Michigan, and constitutes unreasonable and arbitrary class legislation and deprives Plaintiff of his property without due process of law and denies to Plaintiff the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States;

(b) it constitutes unreasonable and arbitrary class legislation and deprives Plaintiff of his property without due process of law, contrary to Article II, Section 16 of the Constitution of the State of Michigan;

(c) it contravenes Article X, Section 4 of the Constitution of the State of Michigan for the reason that said tax is not uniform upon the classes upon which it operates;

(d) it constitutes a clear and hostile discrimination against contractors with the Michigan State Highway Department with the objective of imposing the economic burden of a tax on the funds contributed by the United States under the Federal Highway Act adopted on August 27, 1958 (72 Stat. 885; Title 23, U.S. Code, Section 101, etc.) and violates the constitutional immunity of the United States from state taxation."

On the other hand the defendant contends that the Legislature has the power to classify those doing business with political subdivisions differently for taxation purposes than those doing business with the State of Michigan; and further contends that the Plaintiff has the burden of establishing that the classification here invoked cannot be justified under any set of circumstances. In that regard the Plaintiff says that on the basis of the facts pleaded in his bill and statutes and cases cited in his brief he has shown that there are no known circumstances justifying the new classification attempted to be made by Act 272, Public Acts 1959, with respect to road contractors doing business with governmental entities, and that the burden of going forward is now on the Defendant. The Defendant

has not pointed out in any way any facts or circumstances justifying the imposition of the tax on contractors with the State and exempting contractors with the political subdivisions thereof.

The Court is approaching this matter on the basis that "All reasonable presumptions and intendments are in favor of the reasonableness and fairness of the enactment unless its arbitrary, unreasonable or oppressive nature is patent." 16 CJS 458.

To decide whether this is a proper classification we should first look to the Michigan Constitution of 1908, Article X, Section 4. This is very pertinent here and cited in almost every Michigan case on proper classification for taxation purposes. It reads as follows:

> "The Legislature may, by law, impose specific taxes, which shall be uniform upon the classes upon which they operate."

It is abundantly clear that the Legislature has the right to create classes. Our Court in Union Steam Pump Co. vs. State, 216 Mich 261 said at page 275 "That the Legislature has the power to classify has also long been recognized. That it is the abuse of such power, not its exercise, that is within the constitutional inhibition, numerous decisions demonstrate."

The governing rules as to classification are stated by Cooley on Taxation, Vol. 1, 4th Edition, Sec. 334 pg. 712 as follows:

> "Conceding that the power to classify exists, the next question is what classifications are proper. The rules are easy to state but their application to particular facts is often attended with difficulty. The following are the governing rules:
>
> 1. A particular classification is proper where based on a reason and not purely arbitrary. There must be a reason for the classification as distinguished from

mere accident, whim, caprice or vindictiveness. 'Clear and hostile discriminations' cannot be made under the guise of classification. A discrimination is not arbitrary, of course, where based on sound reasons of public policy. On the other hand, while there must be a reason for the classification, the reason need not be a good one, and it is immaterial that the statute is unjust. The test is not wisdom but good faith in the classification.

2. Radical differences are not required to sustain a classification for taxation. The differences upon which the classification is based need not be great nor conspicuous. Classification need not depend upon scientific or marked differences in the subjects classified but it is sufficient if it is practical.

3. The reasonableness of the classification cannot be determined by any fixed rule.

4. The Legislature has a broad discretion in the matter of classification. In taxation 'there is a broader power of classification than in some other exercises of legislation'.

5. Classification for taxation is not reviewable by the courts unless palpably arbitrary. It is no concern of the Court whether the classification is the wisest or the best that could be made. The classification need not be 'reasonable and proper' according to the judgment of reviewing judges, but the Court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense. In other words, 'there must be enough reason for it to support an argument, even if the reason is unsound.' However, a discriminatory tax cannot be sustained if the classification is wholly illusory.

6. When a classification is attacked, and any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

7. A classification having some reasonable basis is not invalid merely because it is not made with mathematical nicety nor because in practice it results in some inequality.

8. A classification is not invalid because it affects one person or corporation alone where it is broad enough to apply to others if they exist.

It appears to the Court that in many of the Michigan cases dealing with classifications for taxation purposes the above rules have been adopted and are followed: See Jasnowski vs. Board of Assessors, 191 Mich 287; C. F. Smith vs. Fitzgerald, 270 Mich 659; Shivel vs. Kent County Treasurer, 295 Mich 10; Miller vs. State Apple Commission, 296 Mich 248; Banner Laundry Company vs. State Board of Tax Administration, 297 Mich 419; Fitzpatrick vs. Liquor Control Commission, 316 Mich 83; L.S. Coach Lines vs. Secretary of State, 327 Mich 146; U.S. Cold Storage vs. Detroit Assessors, 349 Mich 81; Butterfield Theaters vs. Department of Revenue, 353 Mich 345; McCullagh vs. Department of Revenue, 354 Mich 413; Rockwell Co. vs. Romulus Township, 365 Mich 632.

It is impossible for this Court to reasonably conceive of any facts in this case to sustain this classification so that road contractors doing business with the State should pay the tax and road contractors doing business with, for example, a county should not pay the tax. Such legislation, is, in our opinion patently unreasonable, palpably arbitrary, discriminatory and wholly illusory. What the Legislature in effect has done is to arbitrarily split or divide a natural class without reason therefore and then treat the two differently.

In the case of State Ex Rel Transport Mfg. Co. vs. Bates, 359 Mo. 1002, 224 S. W. (2d) 996. The Court there in dealing with the Use Tax Statute said at page 1008:

"Relator next contends the tax levied is not 'uniform upon the same class of subjects' as required by Sec-

tion 3 of Article X of the Constitution because purchasers of 'motor vehicles having a seating capacity of ten passengers or more' by the Act are exempt from payment of the tax. Subsection (d) of Section 11412.

With wide discretion the General Assembly may make classifications for taxation purposes, but it is uniformly held that persons or property to be taxed may not be classified 'without reason or necessity'. There is no precise yardstick as to reasonableness of classification and the rule of equality of necessity often tends to practical inequalities. Taxation is not an exact science and tax acts are not to be condemned merely because unavoidable inequalities may result. But the classification cannot be 'palpably arbitrary'. And while the General Assembly may enact statutes applicable to and classifying certain persons or property for taxation purposes yet such classification must include all persons or objects naturally falling within the class. Constitutional class taxation must include within the established class all who belong in it and must exclude all who do not belong in it. All in each natural class must be taxed or exempted alike. A natural class may not be split. The Legislature may not arbitrarily designate for taxation a portion only of a separate class and thus exclude a portion which reasonably should be included and taxed. The tax imposed must apply alike to all naturally and reasonably within the classification set up by the statute. 'The demands of the organic laws are satisfied if all similarly situated are included and none are omitted whose relationship to the subject matter cannot by reason be distinguished from that of those included".

Also our Court in the case of Haynes vs. Lapeer Circuit Judge, 201 Mich 138, quoted with approval the following:

"The Legislature cannot take what might be termed a natural class of persons, split the same in two and then arbitrarily designate the dissevered factions of

the original unit as two classes, and thereupon enact different rules for the government of each."

While that case concerns the police power of the State and not classification for taxation purposes, nevertheless the rule there announced appears to be applicable in the instant case, as well. It is manifest upon the face of the statute that the effect thereof is to impose specific taxes which are not uniform upon the class upon which it operates and is unconstitutional as being contrary to Article X, Section 4 of our Constitution of 1908.

The Motion to Dismiss is denied and an Order may so enter.

(s) Marvin J. Salmon
Circuit Judge

Dated: December 3, 1962.

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

L. A. DAVIDSON,
Plaintiff-Appellant,

v. No. 51886

MICHIGAN DEPARTMENT OF REVENUE, now known as the DIVISION OF REVENUE OF THE DEPARTMENT OF THE TREASURY, STATE OF MICHIGAN,
Defendant.

ORDER

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 18th day of December in the year of our Lord one thousand nine hundred and sixty-seven.

Present the Honorable

John R. Dethmers,
Chief Justice,
Harry F. Kelly,
Eugene F. Black,
Thomas M. Kavanagh,
Theodore Souris,
Michael D. O'Hara,
Paul L. Adams,
Thomas E. Brennan,
Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, as plaintiff and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the order of the Court of Appeals was clearly erroneous.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 18th day of December in the year of our Lord one thousand nine hundred and sixty-seven.

(s) Donald F. Winters
Clerk

APPENDIX B — RELATED OPINION

WALTER TOEBE & COMPANY,
Plaintiff,
v.
DEPARTMENT OF REVENUE,
Defendant.

Civil Action No. 51,430

Civil Action No. 51,431

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1. Taxation — Differences Between State and Its Subdivisions — Exemptions.

Many basic differences exist between the State and its subdivisions that would justify the legislature's exempting the tax on materials used in constructing county, city, or village roads, while not exempting material used in construction of State roads.

2. Same — Classification — Courts — Public Policy.

It is not the function of a court to consider the propriety or justice of a tax, to seek for the motives or to criticize the public policy which sustains the classification adopted, if there are substantial differences between the separate classifications.

References for Points in Headnotes

[1] 51 Am Jur, Taxation §§ 495, 500, 501, 504, 546, 557, 560-564.
[2] 51 Am Jur, Taxation § 340.
[3] 51 Am Jur, Taxation §§ 408-410.
47 Am Jur, Sales and Use Taxes §§ 54, 55.
[4] 47 Am Jur, Sales and Use Taxes §§ 53, 56.
51 Am Jur, Taxation §§ 557-564.
[5] 47 Am Jur, Sales and Use Taxes §§ 53, 56.
51 Am Jur, Taxation §§ 223, 224, 236, 238.
[6] 51 Am Jur, Taxation § 173.
16 Am Jur 2d, Constitutional Law §§ 494-497.
[7] 47 Am Jur, Sales and Use Taxes §§ 43, 53, 56.
50 Am Jur, Statutes §§ 217, 223.
16 Am Jur 2d, Constitutional Law §§ 181-185.
[8] 5 Am Jur 2d, Appeal and Error § 1009.

3. Same — Road Construction Contractors — State — Economic Burden.

A construction contractor with the State does not bear the economic burden of the use tax on materials used in construction of State roads, for although the contractor initially pays the tax, the State reimburses the contractor as he is paid for the work, and the tax is an element of the unit price in the bid.

4. States — Taxation — Immunity — Arbitrariness.

A State in determining problems of intergovernmental tax immunities is dealing with its proper domestic concerns; its power to classify is extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary.

5. Same — Taxation of United States Property — Fair Treatment.

State taxation of those making private use of property of the United States government is subject to treatment as fair as that accorded those with whom the State deals itself.

6. Statutes — Classification — Burden of Proof — Arbitrariness.

It is assumed that there was a sound basis in the reason for the legislature's classification in a statute, until the contrary is shown, the party assailing the classification having the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

7. Appeal and Error — Statutes — Severability — Taxation.

Plaintiffs' contention that the provisions of use tax act selectively removing the tax exemption formerly given to contractors with the United States and the State of Michigan are not severable, and that, therefore, when the amendment respecting contractors with the United States was held to be unconstitutional in a recent decision, the amendment respecting contractors with the State of Michigan also failed *held,* without merit, there being no manifest intent of the legislature that the exceptions set forth be inseparable (CL 1948, § 8.5; CLS 1961, § 205.94; *Knapp-Stiles, Inc., v. Department of Revenue,* 270 Mich 629).

8. Costs — Public Question — Exemption from Use Tax — States — Counties — Municipal Corporations.

No costs are allowed in action for declaratory judgment that provision of use tax act exempting property used in construction of State roads but not property used in construction of roads for counties, cities, or villages (CLS 1961, § 205.94).

Appeal by leave granted prior to decision of Court of Appeals from Oakland; Beer (William John), J. Submitted November 10, 1966. (Calendar No. 13, Docket Nos. 51,430, 51,431.) Decided March 7, 1967.

Complaint by Walter Toebe & Company, a Michigan corporation, against the Michigan Department of Revenue for a declaratory judgment to test the validity of CLS 1961, § 205.94, which imposed use taxes on certain construction materials. Similar complaint by Toebe-Hull Company, a copartnership composed of Walter Toebe & Company and C. A. Hull Co., a Michigan corporation, against the Department of Revenue. Judgments for plaintiffs, holding the section void. Causes consolidated for appeal. Defendant appeals. Reversed.

George J. Fulkerson (*Dennis E. Moffett*, of counsel), for plaintiffs.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, *T. Carl Holbrook*, *William D. Dexter* and *Maurice Barbour*, Assistant Attorneys General, for defendant.

Amici Curiae:

Carl H. Reynolds and *Beaumont, Smith & Harris* (*Laurence A. Masselink*).

KELLY, J. These two cases consolidated for appeal, are for declaratory judgments concerning the constitutionality of section 4, subdivision (m) of PA 1959, No. 272,[1] under which there were assessed use taxes against plaintiffs, Walter Toebe & Company and Toebe-Hull Company.

The stipulation of facts pertaining to Walter Toebe & Company states that:

"While engaged as a road contractor in fulfillment of contracts with the Michigan State highway department during the calendar years 1961, 1962 and 1963, Walter Toebe paid certain use taxes through suppliers and also was assessed certain use taxes on purchases of personal property either used or consumed in said construction."

The above quoted stipulation is also made regarding the other plaintiff, except that Toebe-Hull also fulfilled a contract with the county of Wayne during the stated period.

The Oakland circuit judge held that section 4, subdivision (m) imposing a tax on contractors dealing with the State and exempting those dealing with local units of government, constituted discrimination contra to the constitutional provision that: "The legislature may by law im-

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[1] CLS 1961, § 205.94 (Stat Ann 1960 Rev § 7.555(4)).

pose specific taxes, which shall be uniform upon the classes upon which they operate." Article 10, § 4, Constitution of 1908 [Article 9, § 3, Constitution of 1963].

The use tax act was first enacted in 1937[2] and, as originally enacted, it set forth several categories of exemption, including the United States, the State and subdivisions, churches and schools (subdivisions (i) and (j) of section 4).

Section 4, subdivision (i) read:

"The tax hereby levied shall not apply to: * * *

"Property sold to the United States, the State of Michigan, its departments or institutions, or any of its subdivisions."

PA 1949, No. 273, § 4, subdivision (m), extended the exemption by providing that the tax should not apply to "property purchased by persons engaged in the business of constructing, altering, repairing, or improving real estate for others when property so purchased by such persons shall be affixed and made a structural part of real estate in the fulfillment of a contract" with the United States, the State of Michigan, its departments or institutions, or any of its subdivisions.

PA 1959, No. 263, amended section 4, subdivision (m), eliminating the exemption on property purchased by contractors to fulfill construction contracts with the United States, and later that year the legislature by PA 1959, No. 272 (the amendment now under consideration), eliminated the exemption on property purchased by a contractor whether the work was done for the United States or the State of Michigan.

In 1964, by Act No. 164,[3] the legislature restored the exemption on property purchased by contractors in fulfilling their construction contracts with both the United States and the State of Michigan.

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[2] PA 1937, No 94 (CL 1948, § 205.91 *et seq.* [Stat Ann § 7.555(1) *et seq.*]).

[3] Amending CL 1948, § 205.94 (Stat Ann 1965 Cum Supp § 7.555 (4)).

Contending that contractors are a separate class that was split by section 4, subdivision (m) into two parts plaintiffs state:

"The use tax act did establish contractors as a separate class. However, section 4, subdivision (m) arbitrarily split that class into two parts thereby destroying the tax uniformity required so that the use tax was imposed on purchases of tangible personal property by contractors when they fulfilled their construction contracts with the State of Michigan but exempted contractors from the use tax on such purchases involving contracts with cities, villages, townships and counties of the State."

Appellant, contending that section 4, subdivision (m) meets constitutional requirements and that the Michigan legislature had the right to tax tangible personal property used in the construction of State highways and exempting tangible personal property used in constructing roads for counties, cities, and villages, states:

"The history of the exemptions from use tax as pertains to the construction industry uneqivocally demonstrates that the exemption or lack of exemption with which we are here concerned, is one accorded to or denied a State of local governmental entity. The legislature has never sought, in either the sales or use tax statutes, to exempt, or to economically benefit by any exemption, persons such as the appellees who are private construction contractors engaged in activity for profit. To speak of commercial construction contractors as a class and to seek to identify the legislative power of exemption with these private enterprises completely misses the intent of the legislature in granting the exemption or lack of exemption complained of here. Furthermore, a construction contractor with the State does not bear the economic burden of the use tax. It is an element of the unit price in the bid. This raises a serious question of whether appellees have a justiciable issue to raise in these causes. The tax consequence of

the lack of exemption here complained of is one borne by the sovereign State at the election of the legislature. * * *

"The subdivisions of the State of Michigan are on an entirely different legal, political and economic footing than the State of Michigan and its institutions. There exist many basic differences, in fact, which justify the exemption by the legislature of the purchase of material used by plaintiffs in constructing roads and streets for counties, cities, and townships, while taxing the purchase to tangible personal property used by them in constructing highways for the State of Michigan."

We have approved in *Rockwell Spring & Axle Company v. Rumulus Township* (1962), 365 Mich 632, the right to exempt a tax on one division of government and not on another. The plaintiff in *Rockwell* argued that by those leasing the facilities of Willow Run Airport, which were owned by a State supported educational institution, paying no tax, and by the plaintiff paying a tax on substantially identical facilities leased from the county of Wayne, the act was unconstitutional as lacking tax uniformity. This argument was unanimously rejected.

We agree with appellant that there exist many basic differences between the State and its subdivisions that would justify the legislature exempting the tax on materials used in constructing county, city, and village roads and not State roads, and we have stated in cases like the present that it is not the function of this Court to consider the propriety or justness of the tax, nor to criticize the public policy which led to adoption of the legislation. See *W. S. Butterfield Theatres, Inc., v. Department of Revenue* (1958), 353 Mich 345.

The question presented is whether one group of contractors is favored over another group and is not whether the counties, cities, and villages are favored over the State.

Section 4, subdivision (m) did not designate one group of contractors that could bid on State construction work and another group for county, city, and village work. The

stipulation of facts establishes that plaintiff Toebe-Hull fulfilled a contract with the State of Michigan and with the county of Wayne during the stated period.

The contractor engaged in construction activities for the State initially pays the use tax on the materials needed for such construction work, but the State reimburses the contractor as he is paid for the work, and we agree with defendant's claim that "a construction contractor with the State does not bear the economic burden of the use tax. It is an element of the unit price in the bid."

Plaintiff Toebe-Hull Company admits in the pleadings in this case that it considered the tax in computing its bid and thereby such tax was included in its contract price, but claims that this fact is neither "material or relevant to this case."[4]

Section 4, subdivision (m) did not "split that class [contractors] into two parts," as appellees contend. It only split the property purchased in two parts — the property purchased for State construction and the property purchased for completing work for subdivisions of the State of Michigan.

Plaintiffs in this present appeal and Amici Curiae claim that:

(1) *Knapp-Stiles, Inc., v. Department of Revenue* (1963), 370 Mich 629, is controlling;

(2) "The provisions of section 4, subdivision (m) as amended by PA 1959, No. 272, selectively removing the tax exemption formerly given to contractors with the United States and the State of Michigan are not severable. Consequently, when the amendment respecting contractors with the United States was held to be unconstitutional in *Knapp-Stiles, Inc.*, the amendment respecting contractors with the State of Michigan also failed."

Knapp-Stiles, Inc., v. Department of Revenue, supra, is not controlling, as the only question there decided was

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[4] Defendant's affirmative defense, paragraph 3, page 8a of appendix; plaintiff's reply to defendant's affirmative defense, paragraph 3, page 12a of appendix.

the State's right to impose a tax on property used by contractors in fulfilling contracts with the United States while exempting like contracts with subdivisions of the State.

The distinction between the question presented in that case and the instant case has been established in several United States Supreme Court decisions and in *Knapp-Stiles* we cited *Phillips Chemical Co. v. Dumas Independent School District* (1960), 361 US 376 (80 S Ct 474, 4 L ed 2d 384), where it was said (p 385):

"We have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved. In *Allied Stores of Ohio, Inc., v. Bowers,* 358 US 522, (79 S Ct 437, 3 L ed 2d 480), for example, we noted that the State was 'dealing with [its] proper domestic concerns, and not trenching upon the prerogatives of the National government.' 358 US at 526. When such is the case, the State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary. *Id.,* at 526-528. But where taxation of the private use of the Government's property is concerned, the Government's interests must be weighed in the balance. Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself."

PA 1945, No. 119 (CL 1948, § 8.5 [State Ann 1961 Rev § 2.216]), sets forth the rule of construction in Michigan concerning "severability," as follows:

"In the construction of the statutes of this State the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:

"If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid

by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable."

There being no "manifest intent of the legislature" that the exceptions set forth in section 4, subdivision (m) be inseparable, plus the fact that the invalidation of one exception by *Knapp-Stiles* in no way affects the operability of the others, we must reject plaintiffs' claim in re "severability."

Applying established principles to determine issues such as here presented, this Court assumes "there was a sound basis in the reason for the legislature's classification until the contrary is shown, and one who assails such classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[5]

We conclude that plaintiffs have failed to meet this test and that there is no basis for the legal contentions advanced by plaintiffs-appellees and adopted by the lower court.

Therefore, the judgment of the lower court is reversed and section 4, subdivision (m), of the Michigan use tax act (PA 1937, No. 94, as amended by PA 1959, No. 272) was constitutional, as it related to contracts with the State of Michigan.

No costs, a public question being involved.

DETHMERS, C.J., and BLACK, SOURIS, O'HARA, and ADAMS, JJ., concurred with KELLY, J.

T. M. KAVANAGH, J., concurred in the result.

BRENNAN, J., took no part in the decision of this case.

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[5] *City of Lansing* v. *Township of Lansing* (1959), 356 Mich 641, 650, 651.

APPENDIX C — CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitutional Provision Involved

United States Constitution, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

Mich. Comp. Laws '48, § 205.94(m); Mich. Stat. Ann. § 7.555(4) (m).

Sec. 4. The tax hereby levied shall not apply to:

* * *

(m) Property purchased by persons engaged in the business of constructing, altering, repairing or improving real estate for others when property so purchased by such persons shall be affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a single contract within the exempt classifications set forth in subsections (b), (i), (j) and (k) of this section *other than the United States, its unincorporated agencies and instrumentalities, or any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States* [or the state of Michigan, its departments or institutions]; or which shall not be affixed and made a structural part of real estate but shall be transferred to a person in fulfillment of a contract with such person for his use for an exempt purpose as set forth in subsection (f) or (g) of this section.

(Words italicized added by Public Acts of 1959, No. 263; words in brackets added by Public Acts of 1959, No. 272.)

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No. 1240

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

L. A. DAVIDSON,

Petitioner,

vs.

MICHIGAN DEPARTMENT OF REVENUE,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN[1]

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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN[1]

Respondent opposes the Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan relative to its Order dated September 18, 1967, Docket No. 2522, on the following grounds:

1. The petition does not properly raise any substantial federal question.

2. The only federal question sought to be raised by the

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[1] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan.

Petition has been conclusively adjudicated by this Court contrary to the Petition.

3. The Order of the Court of Appeals from which appeal is sought is conclusive.

The Order reads in pertinent part as follows:

"In this cause a motion for a peremptory order, in accordance with GCR 1963, 820.1(7), reversing the judgment of the Ingham County Circuit Court, is filed, and a brief in opposition thereto having been filed, and due consideration thereof having been had by the Court,

"IT IS ORDERED that the motion for a peremptory order be, and the same is hereby GRANTED, for the reason that the contrary holding on the same issue by the Supreme Court in *Walter Toebe & Co.* v. *Revenue Department* (1967), 378 Mich 617, is dispositive of the matter. The case is remanded to the Ingham County Circuit Court with instructions to render a determination of the other issues involved.

"IT IS FURTHER ORDERED that the motion to affirm be, and the same is hereby DENIED." (1a-2a)

OPINIONS BELOW

There are no opinions of the courts below other than the above-referred-to Order that touches upon the intergovernmental immunity question sought to be raised by petitioner in this cause. Opinions referred to in the Petition relate to nonfederal and equal protection questions.

The Opinion of the Ingham County (Michigan) Circuit Court denying respondent's Motion to Dismiss (5a) upon which the final Judgment of the Ingham County (Michigan) Circuit Court was based, was reversed by the Michigan Court of Appeals' Peremptory Order (1a) on authority of

> *Walter Toebe & Co.* v. *Revenue Department* (1967), 378 Mich 617, 148 NW 2d 775 (19a-27a), (hereinafter referred to as the *Toebe* cases).[2]

JURISDICTION

The petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3). For the reasons set forth herein, the Petition should be denied.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Respondent believes there is no constitutional provision involved. The question before the Michigan Court of Appeals was whether petitioner's cause presented any different classification question than that involved in the *Toebe* cases. Proceedings before the Michigan Court of Appeals, culminating in its Peremptory Order (1a), could not raise the question of the correctness of the Michigan Supreme Court's conclusion in the *Toebe* cases that § 4(m)

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[2]

In the *Toebe* cases, the Michigan Supreme Court found the classification here involved did not violate the equal protection and due process provisions of the Fourteenth Amendment of the United States Constitution. Petitioner participated in the *Toebe* cases as *amicus curiae*.

of the Michigan Use Tax Act, as amended by Act 272, Michigan Public Acts of 1959, did not deny petitioner due process or equal protection of the laws within the purview of the Fourteenth Amendment of the Constitution of the United States.

Contrary to the statement of petitioner on page 4 of its Petition, Act 263 of the Michigan Public Acts of 1959 was effective September 1, 1959, and not 1960. Section 4(m) of the Use Tax Act as amended by Act 263, Michigan Public Acts of 1959, is not an issue in this cause, but rather the statute as amended by Act 272, Michigan Public Acts of 1959,[3] effective January 1, 1960, which, as modified by the case of *Knapp-Stiles* v. *Department of Revenue* (1963), 370 Mich 629, 122 NW 2d 642, reads:

> "(m) Property purchased by persons engaged in the business of constructing, altering, repairing or improving real estate for others when property so purchased by such persons shall be affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a single contract within the exempt classifications set forth in subsections (b), (i), (j) and (k) of this section other than * * * the state of Michigan, its departments or institutions; or which shall not be affixed and made a structural part of real estate but shall be transferred to a person in fulfillment of a contract with such person for his use for an exempt purpose as set forth in subsection (f) or (g) of this section."

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[3]

[Act 94, Michigan Public Acts of 1937, as amended Mich Comp. Laws Mason's '61 Supp. § 205.94(m); Stat Ann 1960 Rev Vol § 7.555(4) (m) (incorrectly cited as Mich Stat Ann § 21.555 (1) on page 3 of the Petition and as Act No. 273 on page 10 of the Petition)].

While the petitioner asserts that there is here involved the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (3, 28a), the order of the Michigan Court of Appeals relates solely to petitioner's argument that § 4(m) of the Michigan Use Tax Act

> "* * * constitutes a clear and hostile discrimination against contractors with the Michigan State Highway Department with the objective of imposing the economic burden of a tax on the funds contributed by the United States under the Federal Highway Act adopted on August 27, 1958 (72 Stat 885; Title 23, U.S. Code, Section 101, etc.) and violates the constitutional immunity of the United States from state taxation." (Petitioner's Complaint, paragraph 19).

QUESTION PRESENTED

The respondent disagrees with the statement of questions presented by petitioner. They are at variance with the pleadings in this cause and the issues as framed and passed upon by the courts below. The question is whether the Michigan Supreme Court in denying petitioner's Application for Leave to Appeal, or the Michigan Court of Appeals by entering its Peremptory Order of September 18, 1967, contravened any federal constitutional right of the petitioner. Furthermore, to the extent that the pleadings in this cause could in any way raise an intergovernmental immunity question, it would have to be framed within the scope of petitioner's allegations in paragraphs enumerated "3" and "19" of its Declaratory Judgment Complaint which is to the effect:

1. That petitioner is engaged in the business of

constructing highways and bridges for the Michigan State Highway Department or various political subdivisions of the State of Michigan, and since 1959 petitioner's highway construction contracts involved projects on the Interstate System, almost exclusively.

2. That under these circumstances the State of Michigan cannot impose a use tax on tangible property which petitioner uses in its highway construction work without imposing a like tax on tangible property used in construction projects for local Michigan governmental units.

Respondent believes the question is appropriately framed as follows:

Did the Michigan Court of Appeals unconstitutionally discriminate against a person doing business under contracts with state government when it granted the respondent's Motion for a Peremptory Order for the reason that the classification issues raised in this cause were properly resolved against the petitioner by the Supreme Court in *Walter Toebe & Co.* v. *Revenue Department, supra* (1967), 378 Mich 617, 148 NW 2d 775?

STATEMENT OF THE CASE

Respondent cannot accept petitioner's statement of the case. The admitted pleadings and a Stipulation of Facts filed in this cause contain the only facts. Petitioner filed a Complaint for Declaratory Relief in the Ingham County (Michigan) Circuit Court, alleging therein that he is a person engaged in the construction of roads and bridges for the State of Michigan and its political subdivisions,

and since 1959 did work almost exclusively on projects on the Interstate System.

Petitioner further alleges that the State of Michigan seeks to unconstitutionally impose a use tax on the tangible personal property acquired by it in the fulfillment of a single contract with the State of Michigan, without imposing a like tax under similar circumstances on tangible personalty used by those doing business with the political subdivisions of the State of Michigan. This is alleged in paragraph "19" of the Complaint as follows:

> "19. To the extent that said Use Tax Act is construed and applied so as to impose upon plaintiff a Use Tax with respect to property purchased and affixed and made a structural part of real estate or used and completely consumed in the fulfillment of a single contract with the State of Michigan and its departments, while exempting from said Use Tax property purchased by contractors in fulfillment of similar contracts with political subdivisions of the State of Michigan, the said Use Tax Act contravenes and is repugnant to the Constitution of the United States of America and to the Constitution of the State of Michigan * * * ."

In the trial court, the respondent filed a Motion to Dismiss the Complaint for the reason that the petitioner had not set forth a cause of action as a matter of law. For reasons set forth in its Opinion of December 3, 1962 (5a-16a), respondent's Motion to Dismiss was denied by Order of the Circuit Court. The Court there opined:

> "It is impossible for this Court to reasonably conceive of any facts in this case to sustain this classification so that road contractors doing business with

the State should pay the tax and road contractors doing business with, for example, a county should not pay the tax. Such legislation is, in our opinion, patently unreasonable, palpably arbitrary, discriminatory and wholly illusory. What the Legislature in effect has done is to arbitrarily split or divide a natural class without reason therefor and then treat the two differently." (14a)

After denial of the respondent's Motion to Dismiss, the cause proceeded to trial. In the Declaratory Judgment dated July 18, 1966, (3a-4a) the Circuit Court affirmed its opinion of December 3, 1962, which was concerned solely with the uniformity and equal protection classification problems posed by § 4(m) of the Michigan Use Tax Act, as amended by Act 272 of the Michigan Public Acts of 1959.[4]

Subsequent to the Judgment of the Circuit Court, the companion cases of *Walter Toebe & Co.* v. *Department of Revenue* and *Toebe-Hull Co.* v. *Department of Revenue, supra* (1967), 378 Mich 617, 148 NW 2d 775, were appealed directly to the Michigan Supreme Court, which direct appeal is allowed under Michigan General Court Rules of 1963 in unusual circumstances where there are involved questions of great public importance. The State of Michigan also appealed the instant cause to the Michigan Court of Appeals.

After the Michigan Supreme Court had accepted jurisdiction in the *Toebe* cases and while they were pending in the Michigan Supreme Court, the petitioner in this cause requested permission of the Michigan Supreme

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[4] Ibid.

Court to take a direct appeal in order that the *Toebe* cases and this cause might be disposed of together. In his application requesting the Michigan Supreme Court to grant a direct appeal, the petitioner stated:

> "Should the plaintiff and appellee be forced to await a decision on a presentation of this case to the Court of Appeals, this Court might, meanwhile, dispose of the two appeals before it [*Toebe* cases] involving the same question and the plaintiff and appellee be thereby deprived of the right to present his position to this court before its decision." [Bracketed material added]

Petitioner's request was denied. The Michigan Supreme Court, however, in its order of denial, invited the petitioner to participate in the *Toebe* cases as *amicus curiae*, which was done by petitioner. In the interim, the parties stipulated in the Michigan Court of Appeals that any further proceedings in this cause await the final disposition of the *Toebe* cases.

After final disposition of the *Toebe* cases (which held § 4(m) of the Use Tax Act as amended by Act 272, Michigan Public Acts of 1959, to be constitutional), the respondent herein filed a Motion in the Michigan Court of Appeals for a Peremptory Order Reversing the Declaratory Judgment of the Circuit Court in this cause for the reason that the *Toebe* cases were dispositive of all questions at issue in this cause. This motion was granted September 18, 1967 (1a-2a).

The petitioner resisted the respondent's request for Peremptory Order with the argument that (1) unlike in the *Toebe* cases he had not included the use tax as an element in his bids for contracts with the Michigan State Highway

Department, and (2) that there is here involved a question of governmental immunity that was not raised in the *Toebe* cases.

The petitioner complains of the refusal by the Michigan Court of Appeals (and the Michigan Supreme Court in denying the petitioner's Application for Leave from the Peremptory Order of the Court of Appeals) (16a-17a) to accept the petitioner's contention that this case is distinguishable from the *Toebe* cases.

The facts firmly establish that the property purchased by petitioner upon which use tax was assessed was used and completely consumed in the fulfillment of his contracts with the State of Michigan. Further, it is not known upon whom would fall the economic burden of the tax here involved.

ARGUMENT

I.

THE PETITION DOES NOT RAISE ANY SUBSTANTIAL FEDERAL QUESTION.

The petitioner sets forth three reasons why this Court should grant his request for Writ of Certiorari:

First, he contends that the Peremptory Order of the Court of Appeals resulted in

> "• • • an unconstitutional discrimination against the United States government and the persons dealing with it. *Phillips Chemical Company* v. *Dumas Independent School District*, 361 U.S. 376 (1959)." (8)

Secondly, petitioner urges this Court to grant the Writ because the *Toebe* cases represent bad law, and are distinguishable from the case at bar inasmuch as here the petitioner allegedly will have to bear the economic burden of any use tax while in the *Toebe* cases this burden was borne by the State of Michigan.

Thirdly, petitioner argues that he has been denied equal protection and due process of law as a result of the classification employed by the Michigan Legislature in § 4(m) of the Michigan Use Tax Act as amended by Act 272, Michigan Public Acts of 1959, *supra*.

1. **As to petitioner's first contention, he has not properly raised any intergovernmental immunity question.** Petitioner possesses no privity with the federal government. The case of

> *Phillips Chemical Co.* v. *Dumas School Dist.* (1959), 361 US 376; 80 S Ct 474; 4 L ed 2d 384

relied upon by petitioner, clearly demonstrates that the intergovernmental immunity question is concerned only with discrimination against the United States government, its agents, instrumentalities and persons dealing with it (8). Since petitioner could not establish that he has used and consumed the tangible personal property in question in his dealings with the federal government, and since he could not show that he has been singled out and subjected to discrimination on this account, he has not properly raised an intergovernmental immunity question. *Phillips Chemical, supra,* requires only

> "* * * that the State treat those who deal with the government [federal] as well as it treats those with

whom it deals itself."[5] (361 US 376, 385). [Bracketed material added]

The matter in this cause concerns the State of Michigan and its political subdivisions and those doing business with them. Neither the United States government nor those doing business with it are remotely involved or concerned with the question here posed under the facts and circumstances of this cause. This fact constituted the basis for the Michigan Court of Appeals' Order of September 18, 1967, and its conclusion that *Walter Toebe & Co.* v. *Revenue Department, supra,* (1967), 378 Mich 617, 148 NW 2d 775, rather than *Knapp-Stiles* v. *Department of Revenue, supra,* (1963), 370 Mich 629, 122 NW 2d 642, controlled the disposition of this cause.

The assertion by the petitioner that its construction work for the period in question (January 1, 1960 through August 27, 1964) was almost exclusively on Interstate Highway projects does not establish a contractual relationship or privity between petitioner and the federal government nor does it place the federal government in the position of bearing any economic burden of the use tax in question. This assertion does not even establish that petitioner's

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[5]

The constitutional restrictions imposed on a state's power to classify those dealing with the federal government for tax purposes as set forth in *Phillips Chemical, supra,* may be summarily stated as follows:

1. Those dealing with the federal government may not be singled out to bear a tax burden not imposed on others similarly situated;
2. The classification must not constitute an invidious discrimination or be palpably arbitrary;
3. The classification must rest upon some ground or differences having a fair and substantial relation to the object of the legislation and legitimate state policy.

contracts with the State of Michigan involved construction work for which the State received any reimbursement from the federal government.[6]

2. **Whether the ultimate economic burden of the use tax is borne by petitioner or the government is immaterial and such inquiry does not properly raise any federal question.** If, as now alleged by petitioner, he did not include any use tax in his bids for the construction work in question, he is required to absorb any economic burden related to the use tax. If, contrary to such allegation, the economic burden of the use tax in question was in fact passed on to both state and federal government, petitioner would be in the windfall position that he attributes to the taxpayers in the *Toebe* cases (14-15).

Furthermore, assuming that petitioner's bids for con-

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[6] While the record is silent concerning the amount and method of payment on construction contracts on the Interstate System, we understand that the following is the practice, in accordance with law, of the Michigan Department of State Highways: The contractor submits all billings for his work directly to the Michigan Department of State Highways. Payments are made thereon from funds of that department. After the contractor has been paid, the department then submits billings in the amount of the payments to the Bureau of Public Roads, which reviews the billings and makes its proportionate reimbursement on those phases of construction which meet with approval, for participation purposes, of the Bureau. On any given contract there may be one or more phases of construction for which the Federal Bureau of Public Roads will not reimburse the Michigan State Department of Highways for its construction costs. For example, reimbursement will normally be denied as to construction costs resulting from the state's inability to obtain the highway right-of-way; premium time in order to complete a project; additional costs incurred by use of a higher grade of materials than called for by the U. S. Bureau of Public Roads, and for some costs relating to the maintenance of traffic controls.

struction contracts with the State included an amount for use tax, there is nothing in the record that could constitute a basis for allocating this use tax between those construction expenses that might be ultimately borne by the United States government and those expenses ultimately borne by the State of Michigan.

In any event, these allegations concerning the ultimate economic burden are not dispositive of either equal protection or intergovernmental immunity questions.

3. **Petitioner has not properly brought before this court a Fourteenth Amendment equal protection question.** The constitutionality of the classification here involved was specifically considered by the Supreme Court of Michigan in *Walter Toebe & Co.* v. *Revenue Department, supra,* (1967), 378 Mich 617, 148 NW 2d 775. [The opinion in that cause is set forth in the Petition as Appendix B (18a-27a)].

Petitioner participated as *amicus curiae* in the Supreme Court in the *Toebe* cases. He did not interject any equal protection argument in defense of the respondent's Motion to Dismiss this cause in the Michigan Court of Appeals, which resulted in the Order of Dismissal here involved. Thus, petitioner elected to hold this cause in abeyance and rely upon the *Toebe cases* for adjudication of the equal protection question and ought not be permitted to belatedly raise this question on this appeal.[7]

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[7] In fact, petitioner requested delay by the Court of Appeals in disposition of the respondent's Motion to Dismiss until the time expired for *Toebe, supra,* to be appealed to this court.

II.

THE ONLY FEDERAL QUESTIONS SOUGHT TO BE RAISED BY THE PETITION HAVE BEEN CONCLUSIVELY ADJUDICATED BY THIS COURT CONTRARY TO PETITIONER'S PETITION

A state legislature is authorized to classify, as in the instant case, for tax purposes, as is shown by excerpts from the opinion of the Michigan Supreme Court in *Walter Toebe & Co.* v. *Revenue Department, supra,* (1967), 378 Mich 617, 625, 148 NW 2d 775, 778. In upholding this classification, the Supreme Court of Michigan quoted in part as follows from *Phillips Chemical Co.* v. *Dumas Independent School District, supra,* (1959), 361 US 376; 80 S Ct 474; 4 L ed 2d 384, 390-391:

> " 'We have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved. In *Allied Stores* v. *Bowers* [358 US 522], for example, we noted that the State was "dealing with [its] proper domestic concerns, and not trenching upon the prerogatives of the National Government." 385 U.S., at 526. When such is the case, the State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary. * * *' "

In reference to the equal protection classification problem, the Michigan Supreme Court in the *Toebe* cases stated as follows (378 Mich 622-624; 148 NW 2d 777-778):

"We agree with appellant that there exist many basic differences between the State and its subdivisions that would justify the legislature exempting the tax on materials used in constructing county, city and village roads and not State roads, and we have stated in cases like the present that it is not the function of this Court to consider the propriety or justness of the tax, nor to criticize the public policy which adopted the legislation. See *W. S. Butterfield Theatres, Inc.*, v. *Department of Revenue* (1958), 353 Mich 345.

"The question presented is whether one group of contractors is favored over another group and is not whether the counties, cities and villages are favored over the State."

This Honorable Court has recognized a reasonably wide authority of legislative classification.

As stated in

Citizens' Telephone Co. v. Fuller (1912), 229 US 322, 331; 33 S Ct 833; 57 L ed 1206:

"* * * Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. Keeney v. New York, 222 U.S. 536, 56 L. ed. 305, 38 L.R.A. (N.S.) 1139, 32 Sup. Ct. Rep. 105. The state is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See Quong v. Kirkendall, 223 U.S. 59, 62, 63, 56 L. ed. 350-352, 32 Sup. Ct. Rep. 192. Thus defined and thus limited, it is a vital principle, giving to government freedom to meet

its exigencies, not binding its action by rigid formulas, but apportioning its burden, and permitting it to make those discriminations which the best interests of society require.' "

As otherwise stated in

Watson et al., Executors of Watson v. State Comptroller of the State of New York (1920), 252 US 122, 124-125; 41 Sup. Ct. Rep. 43; 65 L.ed 170:

"* * * Any classification is permissible which has a reasonable relation to some permitted end of governmental action. * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.' * * * "[8]

Petitioner in its equal protection argument ignores the distinction clearly drawn by this Court between the classification problem posed by the intergovernmental immunity decisions and the equal protection decisions[9] which distinction was noted by this Court in *Phillips Chemical Co.* v. *Dumas Independent School District, supra,* (1959) 361 US

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[8]

To the same effect are the following three cases: *Williamson, Attorney General of Oklahoma, et al., v. Lee Optical of Oklahoma, Inc., et al.,* (1954) 348 US 483; 75 S Ct 461; 99 L ed 563; *Kotch et al., v. Board of River Port Pilot Comm'rs for the Port of New Orleans et al.,* (1946), 330 US 552; 67 S Ct 910; 91 L ed 1093; and *McGowan et al., v. Maryland* (1961), 366 US 420; 81 S Ct 1101; 6 L ed 2d 393.

[9]

This distinction accounts for the differences in results reached by the Supreme Court of Michigan in the cases of *Knapp-Stiles v. Department of Revenue, supra,* (1963), 370 Mich 629; 122 NW 2d 642 and *Walter Toebe & Co. v. Revenue Department, supra,* (1967), 378 Mich 617; 148 NW 2d 775.

376; 80 S Ct 474; 4 L ed 2d 384, and by the Michigan Supreme Court in the *Toebe* cases.

The petitioner cannot establish—and the Michigan Supreme Court properly rejected his argument as *amicus curiae* in the *Toebe* cases—that the legislative classification results in unconstitutional discrimination.

III.

THE ORDER OF THE COURT OF APPEALS FROM WHICH APPEAL IS SOUGHT IS CONCLUSIVE.

The Order of the Michigan Court of Appeals here questioned simply held that the *Toebe* cases were dispositive of petitioner's Complaint in this cause. The Michigan Supreme Court declined to disturb such holding by denying petitioner's Application for Leave to Appeal. In the Michigan Court of Appeals, the petitioner sought to distinguish its Complaint from the *Toebe* cases by arguing that unlike *Toebe*, he is entitled to have § 4(m) of the Michigan Use Tax Act, as amended by Act 272 of the Michigan Public Acts of 1959, declared unconstitutional on authority of *Phillips Chemical, supra.*

For reasons heretofore indicated, the *Toebe* cases were correctly decided by the Supreme Court of Michigan on authority of clear precedent of this court. Also, *Phillips Chemical, supra,* conclusively adjudicates the intergovernmental question contrary to petitioner's position.

CONCLUSION

Petitioner, in requesting this Court to review the Michigan Court of Appeals' Order of September 18, 1967, erroneously assumes that he can properly place before this

Court for its consideration the question of whether § 4(m) of the Michigan Use Tax Act, as amended by Act No. 272 of Michigan Public Acts of 1959, unconstitutionally discriminates against him.

The Michigan Court of Appeals, in granting the Peremptory Order in question and the Michigan Supreme Court in denying petitioner's Application for Leave to Appeal determined that the Supreme Court of Michigan's decision in the *Toebe* cases, *supra,* is dispositive of this cause. In so doing, it necessarily concluded that the rule in the *Toebe* cases, *supra,* and not that of *Knapp-Stiles,*[10] *supra,* or *Phillips, supra,* constituted controlling precedent. As herein indicated, petitioner's effort to distinguish his cause from *Toebe, supra,* and to bring himself under the immunity umbrella of *Phillips, supra,* lacks substance.

In addition, the petitioner attempts here to raise the equal protection question. It is clear that the equal protection question lacks appropriateness and substance.

It is further noted that irrespective of the nature and scope of the intergovernmental immunity and equal protection arguments of the petitioner, still there is no basis for its argument that the Michigan Court of Appeals' Peremptory Order here appealed from results in any unconstitutional discrimination against the petitioner.

Petitioner fails to show in his petition how a federal

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[10]

Petitioner's cause is controlled by classification cases such as *Allied Stores v. Bowers* (1958) 358 US 522; 3 L ed 2d 480; 79 S Ct 437, and not the intergovernmental immunity cases, such as *Phillips Chemical v. Dumas, supra. Knapp-Stiles, supra,* deals with intergovernmental immunity, as does *Phillips, supra,* while the Toebe cases simply deal with a state's power to classify under the Fourteenth Amendment which is controlled by *Allied Stores, supra.*

question is presented. To the contrary, he shows a question which lacks importance to this Court.

RELIEF

THEREFORE, it is respectfully requested that this Court deny the Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan.

Respectfully submitted,

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